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MENTERI HAL EHWAL DALAM NEGERI & ORS v. KERAJAAN NEGERI PULAU PINANG

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF CJ
AHMAD MAAROP CJ (MALAYA)
B ZAHARAH IBRAHIM FCJ
RAMLY ALI FCJ
ALIZATUL KHAIR OSMAN FCJ
[CIVIL APPEAL NO: 01(f)-61-11-2017(P)]
14 MAY 2019

C

UNINCORPORATED ASSOCIATIONS: *Societies – Pasukan Peronda Sukarela Pulau Pinang – Society established to give residents opportunity to assist State Government in reducing crimes and managing emergencies and natural disaster – Altercation between members of society and member of public – Minister declared*
D *society unlawful on grounds of carrying out activities prejudicial to public order – Whether society fell within legal and statutory definition of 'society' – Whether society excepted by statutory definition of 'society' – Whether society lawfully established – Whether Minister had unfettered discretion to declare society unlawful – Whether Minister's discretion exercised reasonably – Societies Act 1966, ss. 2, 5,*
E *6(2)*

STATUTORY INTERPRETATION: *Societies Act 1966 – Section 2 – 'Society' – Whether Pasukan Peronda Sukarela Pulau Pinang fell under definition of 'society' – Whether fell under statutory exception of definition of 'society'*

F Pasukan Peronda Sukarela Pulau Pinang ('PPS') was established by the State Government of Penang ('respondent') to give the residents of Penang an opportunity to assist the respondent in reducing crimes and managing emergencies and natural disasters. When a man alleged that he was assaulted by members of PPS, the public called for the banning of PPS. In a press statement, the first appellant ('Minister'), declared PPS to be an unlawful
G society, pursuant to s. 5(1) of the Societies Act 1966 ('Act'), as the society was said to carry out activities hazardous to public peace and desired to take over the role of the police ('the order'). This prompted the respondent to apply for a judicial review at the High Court to quash the order. The issues that arose for adjudication at the High Court were, *inter alia*, (i) whether PPS
H was lawfully established by the respondent under s. 101(v) of the Local Government Act 1976 ('LGA'); (ii) whether PPS was a society; and (iii) whether PPS was a mechanism created by the respondent to complement the police and other Government and law enforcement agencies and, therefore, the Minister's decision was perverse. The High Court dismissed
I the respondent's application on the grounds that (i) a State Government does not fall within ss. 2 and 13 of the LGA; (ii) based on s. 6(2) of the Act, PPS,

being a non-registered society, could not organise or take part in any activity and, therefore, PPS had contravened s. 6(1) and (2) of the Act; and (iii) the Minister's decision was not perverse as he had unfettered discretion to declare PPS unlawful, based on the words 'absolute discretion' used in s. 5 of the Act. The respondent appealed against the decision of the High Court. The Court of Appeal, in allowing the appeal, held that (i) PPS was a machinery of the Penang State Government, lawfully established by the respondent, pursuant to the powers conferred upon it by the LGA and/or the Federal Constitution; (ii) the order, which presupposed PPS was a society under the Act, could not stand in law; (iii) there was no evidence to support the Minister's opinion that PPS was involved in activities prejudicial to public order; (iv) the Minister's discretion was still subject to reasonableness and, in this case, the order was unreasonable and irrational. Hence, the present appeal. Supporting its appeal, the respondent took the position that (i) PPS was not a society as it was an association of persons constituted under the Federal Constitution, and to a certain extent the LGA, and it fell within the exception in para. (b) of the definition of 'society' in the Act; and (ii) it has the power to issue Executive orders, in the form of EXCO directions, for the establishment of PPS as such establishment is within the meaning of 'machinery of the State Government' in item 7 of the State List. The question of law that arose for determination was whether any club, companies, partnership or association of seven or more persons, for the purpose of community policing, could be set up without any legislation enabling its set up.

Held (allowing appeal in part)
Per Zaharah Ibrahim FCJ delivering the judgment of the court:

(1) PPS is a society as that term is defined in s. 2 of the Act. Given the objective of the establishment of PPS, PPS is an association and each unit of PPS is also an association. Each unit of PPS was an association of, at least, 15 persons and PPS was an association of numerous persons. Any association of seven or more persons 'whatever its nature or object, whether temporary or permanent' is a society within the meaning of the term 'society' as defined in s. 2 of the Act unless that association is one of those excepted from the definition. The exceptions are specified in paras. (a) to (g) of the definition. (paras 56, 57 & 81)

(2) The court was unable to agree with the respondent's claim that it had the power to issue Executive orders, in the form of EXCO directions, for the establishment of PPS as such establishment is within the meaning of 'machinery of the State Government' in item 7 of the State List. 'Machinery of the State Government' means what is required to run or govern the State. An indication of what the term 'machinery of the Government' entails could be seen from the items set out in paras. (a)

to (f) of item 7. PPS is meant to be an initiative to involve members of the public in activities which are not part of what is needed to keep the Government of the State functioning. There is nothing in item 7 of the State List which provides for the constitution of a voluntary association of persons, such as PPS, to assist a State Government in the administration of the State or the performance of its functions. Item 7 could not be the written law envisaged by para. (b) of the definition of 'society' in s. 2 of the Act. (paras 73-75, 77 & 78)

(3) Section 6 of the Act requires every local society to be registered before its members can take part in any activity of or on behalf of the society. PPS was never registered. Every member who organised or took part in any activity of PPS, without the written permission of the Registrar of Societies, committed a breach of s. 6(2) of the Act and committed an offence. However, the basis of the order was not specifically the contravention of s. 6 of the Act. The order declared that PPS was an unlawful society as the Minister was of the opinion that it was being used for purposes prejudicial to public order. The Minister's affidavit, except on the registration status of PPS, were bare assertions without any evidence to support them. The Minister's opinion had not been substantiated and the exercise of discretion by the Minister, in making the order, was clearly unreasonable and irrational. (paras 84-86, 89, 97 & 98)

(4) The respondent had provided documents to show that the police not only knew of the existence of PPS but had, in fact, been cooperating with the respondent on matters relating to PPS. The document 'Panduan Operasi PPS' clearly showed that members of PPS were only to assist enforcement agencies and not allowed to act on their own. There was no question of the PPS usurping the powers of the enforcement agencies. (paras 90 & 91)

Bahasa Malaysia *Headnotes*

Pasukan Peronda Sukarela Pulau Pinang ('PPS') ditubuhkan oleh Kerajaan Negeri Pulau Pinang ('responden') untuk memberi peluang kepada penduduk-penduduk Pulau Pinang membantu responden mengurangkan jenayah dan menangani kecemasan dan bencana alam. Apabila seorang lelaki mendakwa dia diserang oleh ahli-ahli PPS, orang awam menyeru PPS diharamkan. Dalam satu kenyataan akhbar, perayu pertama ('Menteri'), mengisytiharkan PPS adalah satu pertubuhan yang menyalahi undang-undang, bawah s. 5(1) Akta Pertubuhan 1966 ('Akta'), kerana persatuan tersebut dikatakan menjalankan aktiviti-aktiviti yang membahayakan ketenteraman awam dan berniat mengambil alih peranan pihak polis ('perintah'). Ini mendorong responden memohon semakan kehakiman di Mahkamah Tinggi untuk membatalkan perintah tersebut. Isu-isu berbangkit untuk diputuskan oleh Mahkamah Tinggi adalah, antara lain, (i) sama ada PPS ditubuhkan secara sah bawah s. 101(v) Akta Kerajaan Tempatan 1976

('AKT'); (ii) sama ada PPS satu pertubuhan; dan (iii) sama ada PPS satu mekanisme yang ditubuhkan oleh responden untuk melengkapi polis dan lain-lain agensi Kerajaan dan penguat kuasa undang-undang dan, berikutan itu, keputusan Menteri tidak munasabah. Menjawab isu-isu di atas, Mahkamah Tinggi menolak permohonan responden atas alasan (i) Kerajaan Negeri tidak terangkum bawah ss. 2 dan 13 AKT; (ii) berdasarkan s. 6(2) Akta, PPS, sebagai satu pertubuhan tidak berdaftar, tidak boleh mengatur atau mengambil bahagian dalam apa-apa aktiviti dan, dengan itu, PPS melanggar s. 6(1) dan (2) Akta; dan (iii) keputusan Menteri adalah munasabah kerana beliau mempunyai budi bicara luas untuk mengisytiharkan PPS menyalahi undang-undang berdasarkan perkataan-perkataan 'budi bicara yang mutlak' dalam s. 5 Akta. Responden merayu terhadap keputusan Mahkamah Tinggi. Mahkamah Rayuan, dalam membenarkan rayuan tersebut, memutuskan (i) PPS satu jentera Kerajaan Negeri Pulau Pinang yang ditubuhkan secara sah oleh responden, bawah kuasa-kuasa yang diberi kepadanya oleh AKT dan/atau Perlembagaan Persekutuan; (ii) perintah tersebut, yang mengandaikan PPS satu pertubuhan bawah Akta, tidak boleh kekal bawah undang-undang; (iii) tiada keterangan menyokong pendapat Menteri bahawa PPS terlibat dalam aktiviti-aktiviti yang memudaratkan ketenteraman awam; (iv) budi bicara Menteri masih tertakluk pada kemunasabahan dan, dalam kes ini, perintah tersebut tidak munasabah dan tidak rasional. Maka timbul rayuan ini. Menyokong rayuannya, responden menghujahkan (i) PPS bukan satu pertubuhan kerana PPS satu persatuan orang-orang yang ditubuhkan bawah Perlembagaan Persekutuan, dan setakat tertentu AKT, dan terangkum bawah pengecualian dalam perenggan (b) tafsiran 'pertubuhan' bawah Akta; dan (ii) responden mempunyai kuasa mengeluarkan perintah-perintah Eksekutif, dalam bentuk arahan-arahan EXCO, demi penubuhan PPS kerana penubuhan sedemikian adalah dalam maksud 'jentera Kerajaan Negeri' dalam item 7 Senarai Negeri. Soalan undang-undang yang timbul untuk diputuskan adalah sama ada apa-apa kelab, syarikat, perkongsian atau persatuan yang mengandungi tujuh atau lebih orang, bertujuan mengawasi komuniti, boleh ditubuhkan tanpa apa-apa undang-undang yang membolehkan penubuhannya.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Zaharah Ibrahim HMP menyampaikan penghakiman mahkamah:

(1) PPS ialah satu pertubuhan kerana terma tersebut ditafsir dalam s. 2 Akta. Berdasarkan objektif penubuhan PPS, PPS ialah satu persatuan dan setiap unit PPS juga satu persatuan. Setiap unit PPS satu persatuan yang mengandungi, paling kurang, 15 orang dan PPS ialah satu persatuan yang mengandungi beberapa orang. Apa-apa persatuan yang mengandungi tujuh atau lebih orang 'tidak kira apa jua jenis atau tujuannya, sama ada sementara atau kekal' ialah persatuan dalam

maksud terma 'pertubuhan' seperti yang ditafsir dalam s. 2 Akta melainkan persatuan ini satu persatuan yang dikecualikan daripada tafsiran. Pengecualian-pengecualian ini diperuntukkan bawah perenggan (a) hingga (g) tafsiran.

(2) Mahkamah tidak bersetuju dengan hujahan responden bahawa responden mempunyai kuasa mengeluarkan perintah-perintah Eksekutif, dalam bentuk arahan-arahan EXCO, demi penubuhan PPS kerana penubuhan sedemikian adalah dalam maksud 'jentera Kerajaan Negeri' dalam item 7 Senarai Negeri. 'Jentera Kerajaan Negeri' bermaksud apa-apa yang diperlukan untuk mengendali atau mengawal selia Negeri. Bayangan apakah terma 'jentera Kerajaan' boleh dilihat dalam item-item yang disenaraikan dalam perenggan (a) hingga (f) item 7. PPS ialah satu inisiatif bertujuan melibatkan orang-orang awam dalam aktiviti-aktiviti yang bukan sesuatu yang diperlukan untuk memastikan Kerajaan satu-satu Negeri berfungsi. Tiada apa-apa dalam item 7 Senarai Negeri yang memperuntukkan penubuhan persatuan orang-orang sukarela, seperti PPS, untuk membantu Kerajaan Negeri dalam pentadbiran Negeri atau pelaksanaan fungsinya. Item 7 bukan undang-undang bertulis yang dibayangkan oleh perenggan (b) tafsiran 'pertubuhan' dalam s. 2 Akta.

(3) Seksyen 6 Akta mengkehendaki agar semua pertubuhan tempatan didaftarkan sebelum ahli-ahlinya boleh mengambil bahagian dalam apa-apa aktiviti dalam atau mewakili pertubuhan. PPS tidak pernah didaftarkan. Semua ahli yang menganjur atau mengambil bahagian dalam apa-apa aktiviti PPS, tanpa kebenaran bertulis Pendaftar Pertubuhan, melanggar s. 6(2) Akta dan melakukan satu kesalahan. Walau bagaimanapun, asas perintah tersebut bukan khusus tentang pelanggaran s. 6 Akta. Perintah mengisytiharkan PPS satu pertubuhan yang menyalahi undang-undang kerana Menteri berpendapat PPS digunakan untuk tujuan-tujuan yang menjejaskan ketenteraman awam. Afidavit Menteri, kecuali tentang pendaftaran status PPS, hanyalah dakwaan semata-mata tanpa apa-apa keterangan menyokong. Pendapat Menteri tidak disokong dan penjalanan budi bicara Menteri, dalam mengeluarkan perintah, jelas tidak munasabah dan tidak rasional.

(4) Responden telah mengemukakan dokumen-dokumen yang menunjukkan pihak polis bukan sahaja tahu akan kewujudan PPS bahkan bekerjasama dengan responden dalam hal-hal berkaitan PPS. Dokumen 'Panduan Operasi PPS' jelas menunjukkan ahli-ahli PPS hanya perlu membantu agensi-agensi penguat kuasa dan tidak dibenarkan bertindak sendiri. Persoalan tentang PPS melangkaui kuasa-kuasa agensi penguat kuasa tidak timbul.

Case(s) referred to:
Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
Sharpe v. Wakefield [1891] AC 173 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 78
Federal Constitution, arts. 74(2), 76(1), 80(1), Ninth Schedule List I item 3, List II items 4, 7(a), (b), (c), (d), (e), (f)
Local Government Act 1976, ss. 2, 9, 13, 101(v)
Societies Act 1966, ss. 2, 5(1), 6(1), (2)

For the appellants - Shamsul Bolhassan & Shaiful Nizam Shahrin; SFCs
For the respondent - Ambiga Sreenevasan & Ganesan Nethi; M/s Tommy Thomas

[Editor's note: For the Court of Appeal judgment, please see Government Of The State Of Penang v. Minister Of Home Affairs & Ors [2017] 1 LNS 501 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Zaharah Ibrahim FCJ:

Introduction

[1] The respondent's application for judicial review to quash the order dated 3 November 2014 ("the impugned order") made by the first appellant declaring Pasukan Peronda Sukarela Pulau Pinang ("PPS") as an unlawful society was dismissed by the High Court. The respondent succeeded on appeal. The order of the High Court was set aside. This is the appeal against that decision of the Court of Appeal.

[2] For ease of reference, in this judgment, we will refer to the first appellant as the "Minister" and the second appellant as the "IGP".

Background Facts

[3] The proposal to form the PPS was first announced at the sitting of the Penang State Legislative Assembly on 29 April 2009.

[4] The stated objective of the PPS was to afford an opportunity for residents of Penang to assist the respondent in its efforts in reducing crime through community policing, and in the management of emergencies and natural disasters.

[5] The establishment of the PPS was approved by the respondent pursuant to the decisions of the State Executive Council at its meetings on 27 April 2011 and 4 May 2011 ("EXCO decisions").

[6] The PPS was placed under the Welfare, Caring Society and Environment portfolio of the Penang State Executive Council.

[7] On 17 August 2014, one Ong Eu Soon ("Ong") alleged that he was assaulted by a group of individuals wearing purple vests (whom he identified as members of the PPS) in front of the Bandar Baru Air Itam market around 11pm that night. He lodged a police report to this effect.

[8] Lee Yew Kuen and Lee Chan Kwong who were members of the PPS subsequently lodged their respective police reports claiming that the altercation on 17 August 2014 involved only Ong and themselves and not a group of the PPS members. They added that Ong was the aggressor whilst they were merely defending themselves. This incident led to calls for the PPS to be banned.

[9] On 27 August 2014, the IGP issued a statement that the police would investigate the activities of the PPS and take action.

[10] On 29 August 2014, the IGP issued a warning to the PPS to cease all activities as the PPS had been deemed illegal. He added that a failure to adhere to the warning would result in arrests. No reason for this warning was disclosed by the IGP.

[11] On 31 August 2014, a total of 154 out of 200 members of the PPS who participated in a march in a Penang State-level parade held at the Esplanade, Penang, in conjunction with the Merdeka Day celebrations were arrested towards the end of the parade. Vests, membership cards and other items belonging to members of the PPS were also seized.

[12] Subsequently, the Chairman, the Chief Co-ordinating Officer and the Chairman of the PPS Committee in the constituency of Seri Delima as well as the Member of Parliament for Tanjung were also arrested in connection with the first arrests.

[13] The Registrar of Societies ("ROS") initiated inquiries into the PPS and held a meeting with the PPS on 3 September 2014. This was followed by a letter from the ROS dated 1 October 2014 requesting further information from the PPS by a questionnaire. The PPS duly completed the questionnaire and submitted it to the ROS with a letter dated 9 October 2014.

[14] On 3 November 2014, the Minister in a press statement declared the PPS to be an unlawful society pursuant to sub-s. 5(1) of the Societies Act 1966 ("Societies Act") based on his opinion that the PPS, "... is an organisation that carries out activities that are hazardous to public peace in the country" and "... wants to take over the role of the police".

[15] Although no formal written notification was sent to the respondent, the PPS later discovered upon its own inquiry that an order dated 3 November 2014 (the impugned order) declaring PPS an unlawful society had been issued and published in the *Gazette* as P.U.(A) 288/2014 under s. 5 of the Societies Act.

At The High Court

[16] On 27 January 2015, the respondent filed an application for judicial review to have the impugned order quashed.

[17] At the conclusion of the full hearing, the High Court dismissed the application for judicial review.

[18] On the issue of whether the PPS was lawfully established by the respondent under para. 101(v) of the Local Government Act 1976 ("Local Government Act"), the High Court held that a State Government does not fall within ss. 2 and 13 of the Act.

[19] On the issue of whether the PPS was a society, the High Court held that based on the provisions of sub-s. 6(2) of the Societies Act, the PPS being a non-registered society, could not organise or take part in any activity. Therefore, the PPS had contravened sub-ss. 6(1) and (2) of the Societies Act.

[20] On the issue of whether the PPS was a mechanism created by the respondent to complement the police and other government and law enforcement agencies and therefore the order of the Minister was perverse, the High Court held that the word used in s. 5 of the Societies Act is "absolute discretion" and so the Minister was given an unfettered discretion to declare the PPS unlawful. Based on the Minister's affidavit-in-reply, the court found that the Minister had taken into consideration relevant facts before satisfying himself that the PPS was being used for purposes prejudicial to public safety. Therefore, the Minister's decision was not perverse.

[21] On the issue whether, under sub-s. 5(1) of the Societies Act, the Minister was obliged to inform the respondent before he made the impugned order, the High Court held that the Minister was not under any duty to hear from the respondent before he made the impugned order. Since there was no such duty imposed on the Minister, the respondent could not say that it had been deprived of an opportunity to be heard.

[22] The respondent appealed against the decision of the High Court to the Court of Appeal.

At The Court Of Appeal

[23] The Court of Appeal, after hearing the parties, allowed the respondent's appeal and set aside the order of the High Court.

[24] In allowing the appeal, the Court of Appeal unanimously held that the learned judge erred in failing to consider the position taken by the respondent *vis-a-vis* the Federal Constitution.

[25] According to the Court of Appeal, pursuant to art. 80 of the Federal Constitution, a State Government clearly had the power to issue executive orders in respect of matters under the State List. It could not be denied that the PPS was formed pursuant to the executive and administrative powers of

the respondent government *vide* MMK Bil 16/2011 to provide "local government services" to the State. Local government is a matter within the State List and the decision of the MMK was a policy decision well within the scope and responsibility of the respondent.

[26] The Court of Appeal noted that even the appellants had no quarrel with the fact that the PPS was established by the respondent to provide services to the State as evident from the Minister's affidavit. In the affidavit he stated that "... pada asalnya pertubuhan PPS adalah untuk melaksanakan (sic) aktiviti- aktiviti sukarela yang berbentuk kemasyarakatan bagi Kerajaan Negeri ...". This necessarily meant, according to the Court of Appeal, that the PPS could properly exist as an unincorporated sole or association.

[27] Hence, the Court of Appeal agreed that the PPS was a machinery of the Penang State Government lawfully established by the respondent pursuant to the powers conferred upon it by the Local Government Act and/or the Federal Constitution. As such, the impugned order which presupposed that the PPS was a society under the Societies Act could not stand in law.

[28] The Court of Appeal further held that there was no evidence to support the Minister's opinion that the PPS was involved in activities prejudicial to public order. The Minister's discretion under s. 5 of the Societies Act, according to the Court of Appeal, is still subject to reasonableness. The Court of Appeal held that in this case the order was unreasonable and irrational.

At The Federal Court

Leave Question

[29] The appellants applied to this court for leave to appeal against the decision of the Court of Appeal. On 27 October 2017, leave was granted.

[30] The question of law (which we will refer to as leave question after this) for which leave was granted is:

> Whether any club, companies, partnership or association of seven or more persons for the purpose of community policing can be set up without any legislation enabling its set up.

Submissions

Submissions By The Appellants

[31] The appellants submitted that para. 101(v) of the Local Government Act was not an enabling power by itself for the respondent to establish the PPS. In terms of the PPS, there must be a positive law that specifically authorises the PPS to conduct policing and to maintain public order and prevent crime.

[32] An example of positive law for community policing is found in Rukun Tetangga Act 2012 and Akta Pasukan Sukarelawan Malaysia 2012. The establishment, powers and functions of community policing are expressly

provided for under these two Acts. The respondent could not stretch the interpretation or scope of para. 101(v) of the Local Government Act to cover acts such as the setting up of the PPS.

[33] According to the appellants, the responsibility for and functions of policing and crime prevention come under the Federal Government and not any other entity including the PPS. Therefore, the objectives of the PPS are matters within the purview of the Federal Government.

[34] The definition of "society" in the Societies Act, according to the appellants, includes any club, company, partnership, or association of seven or more persons whatever its nature or object, whether temporary or permanent, unless it falls within any of the exceptions mentioned in s. 2 of the Act.

[35] Under s. 6 of the Societies Act, until a local society is registered under the Societies Act, a person is prohibited, without the written permission of the ROS, from organising or taking part in any activity of or on behalf of the society.

[36] The impugned order was made pursuant to s. 5 of the Societies Act. The Minister has the absolute discretion under that section to make the order. The Minister was satisfied that the PPS was operating in contravention of the provisions of the Societies Act, and that in his opinion, the PPS was being used for purposes prejudicial to public order.

[37] The appellants also submitted that the issue of the right to be heard does not arise in s. 5 of the Societies Act.

Submissions By The Respondent

[38] The respondent contended that the impugned order declaring the PPS as an unlawful society pursuant to s. 5 of the Societies Act presupposed that PPS is, within the meaning of that Act, a "society". However, the PPS is not nor intended to be a society.

[39] The Societies Act is not intended to be and does not act as the sole or comprehensive legislation to cover all "associations" of persons. PPS was formed pursuant to the executive and administrative powers of the Penang State Government under para. 101(v) of the Local Government Act.

[40] The respondent contended that art. 80 of the Federal Constitution extends the executive authority of the State Government to all matters which it is empowered to legislate upon.

[41] The provisions of art. 74 and the State and Concurrent Lists in the Ninth Schedule to the Federal Constitution are also relevant, in particular the executive powers of a State Government in relation to the machinery of the State Government and Local Government. It is not in dispute that the PPS

was formed through the respondent's EXCO decisions. Those decisions were made within the ambit and scope of the executive authority of the respondent consistent with the Federal Constitution.

[42] According to the respondent, the uncontroverted evidence also shows that the work of the PPS in community policing has been acknowledged by the police and other government agencies.

[43] When it is appreciated that the PPS is a machinery of the State Government lawfully established by the Penang State Government pursuant to the powers conferred upon it by para. 101(v) of the Local Government Act, and/or the Federal Constitution or otherwise, the impugned order cannot stand in law, rendering it a nullity.

[44] Though s. 5 of the Societies Act allows the Minister to declare as unlawful something that falls within the definition of "society", it is clear that since the PPS is a governmental agency, the Societies Act has no application to the PPS. Stated simply, because the PPS is not a "society", it cannot be declared "unlawful". This is particularly so as the right of freedom of association is a fundamental liberty protected by the Federal Constitution, in consequence, the impugned order is wrong in fact and in law.

[45] For these reasons, the respondent submitted that the answer to the sole leave question is that the PPS, a community policing organisation, was established by the respondent in exercise of its powers conferred by the following legislation:

(i) Articles 74 and 80, and the State List, of the Federal Constitution; and

(ii) sections 9 and 101 of the Local Government Act.

[46] As the PPS is not a society within the meaning of the Societies Act, it is not subject to the jurisdiction of the Minister.

[47] The respondent submitted that the Court of Appeal was absolutely correct in making the finding that the establishment of the PPS was for it to operate as a State Government mechanism to complement the PDRM and other state and government agencies in ensuring and safeguarding the public and safety. So, the first appellant's reason for making the impugned order, namely, that PPS is "being used for purposes prejudicial to public order" was without basis.

Our Analysis

[48] We note that in its judgment, the Court of Appeal had in para. [24] addressed the fact that the respondent's application had been amended by the deletion of the words "pursuant to s. 101(v) of the Local Government Act 1976". This meant that the grounds of challenge by the respondent against the impugned order were essentially:

(i) that the PPS was lawfully and properly established by the respondent; A

(ii) that the PPS was not a society within the meaning of the Societies Act.

[49] However, in the course of submissions before us, para. 101(v) of the Local Government Act was raised. It would appear that this was raised in relation to the executive power of the respondent as conferred by the Federal Constitution. B

Is The PPS A Society?

[50] The PPS was set up by the respondent with the aim of promoting the welfare of the residents of the State of Penang. C

[51] The PPS has members. However, membership of the PPS is voluntary and there is no subscription to be paid by a member upon joining or subsequent to that.

[52] Management structures were put in place for the administration of the PPS at various levels. D

[53] It is clear from the affidavit of Phee Boon Poh affirmed on 26 January 2015 ("Phee's affidavit") that units of the PPS are formed in State Assembly constituencies and each unit is chaired by a patrol leader assisted by a deputy patrol leader and an assistant patrol leader. Each unit consists of at least 15 members. E

[54] Members of each unit of the PPS went on patrol duties and conducted activities in their respective neighbourhoods. They were supplied with vests and caps and were also to be supplied with saws and other tools.

[55] Section 2 of the Societies Act defines a society as follows: F

> "society" includes any club, company, partnership, or association of seven or more persons whatever its nature or object, whether temporary or permanent, but does not include:
>
> (a) any company registered under the provisions of any written law relating to companies for the time being in force in Malaysia; G
>
> (b) any company or association constituted under any written law;
>
> (c) any trade union registered or required to be registered under the provisions of any written law relating to trade unions for the time being in force in Malaysia; H
>
> (d) any company, association or partnership formed for the sole purpose of carrying on any lawful business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof;
>
> (e) any co-operative society, registered as such, under any written law; I

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(f) any organization or association in respect of which there is for the time being in force a certificate (which may be granted, refused or cancelled at his discretion) by a person or authority appointed under the provisions of the written law for the time being in force relating to the registration of schools that such organization or association forms part of the curriculum of a school; or

B

(g) any school, management committee of a school, parents' association or parent-teachers' association registered or exempted from registration under any law for the time being in force regulating schools;

C **[56]** The *Concise Oxford Dictionary* defines "association" as "a group of people organised for a joint purpose". Given the objective of the establishment of the PPS, the PPS **is** an association and each unit of the PPS is also an association.

[57] From Phee's affidavit, the evidence is clear that each unit of the PPS D is an association of at least 15 persons, and the PPS is an association of numerous persons. Any association of seven or more persons "whatever its nature or object, whether temporary or permanent" is a society within the meaning of the term "society" as defined in s. 2 of the Societies Act unless that association is one of those excepted from the definition. The exceptions E are specified in paras. (a) to (g) of the definition.

[58] From the submissions of the respondent before us and the courts below, it appears that the respondent took the position that the PPS is not a society as it is an association of persons constituted under written law, the law being the Federal Constitution and, to a certain extent, the Local F Government Act. The PPS, in other words, as we understand the thrust of the respondent's arguments, falls within the exception in para. (b) of the definition of "society" in the Societies Act.

Was The PPS Constituted Under A Written Law?

G **[59]** The respondent referred to the provisions of art. 80 and art. 74 of the Federal Constitution, read together with the State and Concurrent Lists in the Ninth Schedule to the Federal Constitution.

[60] The provisions of art. 80 of the Federal Constitution relevant to the appeal before us are contained in cl. (1) of that article. That clause provides H as follows:

> 80.(1) Subject to the following provisions of this Article the executive authority of the Federation extends to all matters with respect to which Parliament may make laws, and the executive authority of a State to all matters with respect to which the Legislature of that State may make laws.

I

[61] Article 74 of the Federal Constitution provides for the distribution of legislative powers between the Parliament and the State Legislature. The relevant provisions for the purposes of the appeal before us are in cl. (2) of that article. That clause provides as follows:

> (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say the Second List set out in the Ninth Schedule) or the Concurrent List.

[62] The respondent submitted before us that its executive power to direct the establishment of the PPS falls within items 4 and 7 of the State List. They are reproduced below:

> 4. Local government outside the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, including:
>
> (a) local administration; municipal corporations; local, town and rural board and other local authorities; local government services, local rates, local government elections;
>
> (b) obnoxious trades and public nuisances in local authority areas; and
>
> (c) (Repealed).
>
> 7. Machinery of the State Government, subject to the Federal List, but including:
>
> (a) Civil List and State pensions;
>
> (b) exclusive State services;
>
> (c) borrowing on the security of the State Consolidated Fund;
>
> (d) loans for State purposes;
>
> (e) public debt of the State; and
>
> (f) fees in respect of any of the matters included in the State List or dealt with by State law.

Item 4: Local Government

[63] We shall first examine item 4 to determine if the State Government is empowered to constitute an association like the PPS under this item.

[64] Where Local Government in the States in Peninsular Malaysia is concerned, Parliament had, under the provisions of art. 76, cl. (1), enacted the Local Government Act for purposes of uniformity. Under that Act, the administration of a local authority area is placed squarely in the hands of the local authority established under that Act for that local authority area.

[65] The power that the respondent claimed as one of the sources of its authority for the establishment of the PPS is para. 101(v) of the Local Government Act. Paragraph 101(v) of the Local Government Act reads as follows:

A 101. In addition to any other powers conferred upon it by this Act or by any other written law a local authority shall have power to do all or any of the following things, namely:

...

B (v) to do all things necessary for or conducive to the public safety, health and convenience;

[66] The power in para. 101(v) is the power given to a local authority as part of its Local Government functions. The formation of the PPS was not by a local authority in Penang. This is clear from Phee's affidavit, which we will discuss further later in this judgment.

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[67] The respondent also pointed to s. 9 of the Local Government Act which it claims enables it to issue directions for the formation of the PPS. Section 9 reads as follows:

D 9.(1) The State Authority may from time to time give the local authority directions of a general character, and not inconsistent with the provisions of this Act, on the policy to be followed in the exercise of the powers conferred and the duties imposed on the local authority by or under this Act in relation to matters which appear to the State Authority to affect the interests of the local authority area, and the local authority shall as soon as possible give effect to all such directions.

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(2) The local authority shall furnish the State Authority with such returns, accounts and other information with respect to the property and activities of the local authority as the State Authority may from time to time require.

F **[68]** It must be noted that the power of the State Authority under s. 9 is to give a local authority directions.

[69] Paragraph 17 of Phee's affidavit clearly states that every unit of the PPS could only be formed with the approval of the State Assembly member in whose constituency the unit is to be formed. "Upon obtaining the G necessary approval, the PPS unit must function and adhere to policies that are based on directives and special provisions of the State Government which are distributed to each KADUN yearly". ("KADUN" stands for "Kawasan Ahli Dewan Undangan Negeri" or State Assembly constituency).

[70] Paragraph 18 of Phee's affidavit explains that the PPS is funded by the H annual allocations received from the State Government which are annually allocated to each KADUN.

[71] It is now clear that the PPS has nothing to do with a local authority. In our view, the respondent's reliance on s. 9 and para. 101(v) of the Local Government Act as the legal basis for the establishment of the PPS is not I supported by the facts and the law.

[72] It must be further noted that there is no provision in the Local Government Act that provides for the establishment of an association such as the PPS. An association such as the PPS cannot possibly therefore be constituted under the Local Government Act.

Item 7: Machinery Of The State Government

[73] The respondent claims that it has the power to issue executive orders in the form of the EXCO Directions for the establishment of the PPS as such establishment is within the meaning of "machinery of the State Government" in item 7 of the State List. We are unable to agree.

[74] Machinery of the State Government must necessarily mean what is required to run or govern the State. This would include the establishment of administrative structures and the civil service, the financing for those structures and service and other incidental matters. An indication of what the term "machinery of the Government" entails can be seen from the items set out in paras. (a) to (f) of item 7.

[75] The PPS is meant to be an initiative to involve members of the public in activities which are not part of what is needed to keep the Government of the State functioning.

[76] According to para. 13 of Phee's affidavit, the role of the PPS was to assist government agencies, local authorities and, quite significantly, "other law enforcement agencies".

[77] There is nothing in item 7 of the State List which provides for the constitution of a voluntary association of persons such as the PPS to assist a State Government in the administration of the State or the performance of its functions.

[78] We are therefore of the considered view that item 7 cannot be the written law envisaged by para. (b) of the definition of "society" in s. 2 of the Societies Act.

[79] We need to add that item 7 of the State List is made subject to the Federal List. As we have mentioned above, one of the stated objectives for the formation of the PPS is reducing crime through community policing. Item 3 of the Federal List clearly confers legislative competence on Parliament and not the State Legislature for matters relating to internal security, including the police and public order. It therefore follows that "Machinery of the State Government" does not extend to policing activities or the maintenance of public order.

[80] To enable members of the public to participate and assist in the maintenance of public order, Parliament had enacted laws such as the Rukun Tetangga Act 2012 and Akta Pasukan Sukarelawan Malaysia 2012. The establishment of a body with the stated objective of undertaking community policing is certainly outside the executive powers of a State.

A Conclusion

[81] As is clear from our analysis above, the PPS, in our view, is a society as that term is defined in s. 2 of the Societies Act.

Was The Impugned Order Validly Made?

B Registration Requirement

[82] Section 5 of the Societies Act makes it lawful for the Minister "in his absolute discretion by order to declare unlawful any society or branch or class or description of any societies which in his opinion, is or is being used for purposes prejudicial to or incompatible with the interest of the security C of Malaysia or any part thereof, public order or morality".

[83] Being a society organised and established in Malaysia, the PPS is a "local society" within the meaning of that term as defined in s. 2 of the Societies Act. That term is defined as follows:

D "local society" means any society organised and established in Malaysia or having its headquarters or chief place of business in Malaysia, and includes any society deemed to be established in Malaysia by virtue of section 4;

[84] Section 6 of the Societies Act requires every local society to be E registered before its members can take part in any activity of or on behalf of the society. Section 6 provides as follows:

Application for registration

6. (1) Every local society other than that in respect of which an order made under section 5 is in force shall, in the manner prescribed make application F to the Registrar for registration under this Act.

(2) Until a local society is registered under this Act, no person shall, without a written permission of the Registrar, organise or take part in any activity of or on behalf of the society, except only to apply to, or correspond with the Registrar.

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(3) Any person committing a breach of subsection (2) shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit, and where the breach is a continuing one to a fine not exceeding five-hundred ringgit for every day after the first day during which the breach continues.

H **[85]** That the PPS was never registered is a fact. Thus, every member who organised or took part in any activity of the PPS without the written permission of the ROS committed a breach of sub-s. 6(2) and committed an offence.

I **[86]** However, the basis for the Minister's impugned order was not specifically the contravention of s. 6 of the Societies Act although the Minister's affidavit in reply affirmed on 6 June 2016 ("Minister's affidavit') makes a fleeting mention of the unregistered status of the PPS. The impugned

order states that the declaration that the PPS was an unlawful society was made because the Minister was of the opinion that it was being used for purposes prejudicial to public order.

[87] The Minister claimed that while initially the PPS was established for purposes of providing voluntary welfare services to the community, the PPS had been used for purposes which were prejudicial to public order. Paragraph 15 of the Minister's affidavit contains a list of the alleged transgressions of the PPS and its members.

[88] The Court of Appeal, however, found that the allegations were not supported by evidence. In para. [61] of their judgment, the Court of Appeal said:

> [61] Contrary to the finding of the learned judge, there were no facts or evidence in the 1st respondent's affidavit to support the 1st respondent's decision to declare PPS unlawful on the ground that PPS is being used for purposes prejudicial to public order. This begs the question: in issuing the impugned order, did the 1st respondent act on purely the altercation between one or two members of PPS and a member of the public or did the 1st respondent act on MCA's call to ban the PPS? Bereft of any evidence relating to "purposes prejudicial to public order", we reckoned that the 1st respondent's decision was without any basis ...

[89] We had examined the Minister's affidavit and we agree with the Court of Appeal that the assertions and allegations in para. 15 of the affidavit (except on the registration status of the PPS) were bare assertions without any evidence exhibited to support them.

[90] The respondent, on the other hand, had provided documents to show that the police not only knew of the existence of the PPS but had in fact been co-operating with the respondent on matters relating to the PPS.

[91] The document "Panduan Operasi PPS" clearly shows that members of the PPS were only to assist enforcement agencies and not allowed to act on their own. Based on the "Panduan" therefore, there is no question of the PPS usurping the powers of the enforcement agencies.

[92] The photographs and documents exhibited by the respondent show that the PPS members were not supplied with uniforms as that term is usually understood to mean. They were supplied with vests, caps and name tags as well as identification cards. Thus, the allegation of "pemakaian pakaian seragam" mentioned in the Minister's affidavit is not supported by evidence. As for "tanda pangkat" mentioned in the affidavit, each unit of the PPS has a patrol leader, a deputy patrol leader and an assistant patrol leader. In the absence of any explanation as to what is meant by "tanda pangkat" in the affidavit, we take the view that these are the "pangkat". We are not able to fathom how the identification of these three positions makes the PPS a uniformed body.

[93] The Court of Appeal has also addressed the averments in the Minister's affidavit with regard to the police reports against members of the PPS and the arrests of some of the members. The Court of Appeal found that the Minister's affidavit did not exhibit the police reports on the alleged incidents. However, the respondent's position is that these were isolated cases which were personal in nature and the members found to have contravened the law had all been expelled from the PPS.

[94] The appellants' position is that the Minister is conferred with absolute discretion under s. 5 to make the impugned order, and he can do so if in his opinion the society concerned "is or is being used for purposes prejudicial to or incompatible with the interest of the security of Malaysia or any part thereof, public order or morality". In other words, not only is the decision to make the order within the Minister's absolute discretion, "his opinion" is sufficient basis for making that order.

[95] The Court of Appeal cited the following statement of Lord Halsbury LC in *Sharpe v. Wakefield* [1891] AC 173 at p. 179:

> "discretion" means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to public opinion: … according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself.

[96] The Court of Appeal also, among others, referred to the celebrated judgment of Raja Azlan Shah Ag CJ (Malaya) (as His Royal Highness then was) in *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135. His Royal Highness said:

> Unfettered discretion is a contradiction in terms. … Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to interfere.

[97] What is clear to us from the Minister's affidavit is that the Minister's opinion that the PPS was being used for purposes prejudicial to public order has not been substantiated. Can it be said that he still could exercise his absolute discretion to declare the PPS an unlawful society?

[98] We are of the considered view that where there is no reasonable basis for the formation of the opinion that the PPS was being used for purposes prejudicial to public order, the exercise of discretion by the Minister in making the impugned order is clearly unreasonable and irrational.

Decision

[99] The provisions of the Societies Act are clear. Any association of seven or more persons, whatever may be the purpose of the association, is a society for the purposes of that Act unless it is one of the excepted associations as specified in the definition of "society" in s. 2 of the Act. We therefore answer the leave question in the following manner:

> Where an association claims that it is not a society within the meaning of the Societies Act 1966, that association must be shown to be one of those excepted by the definition of the term "society" in section 2 of the Act. Where the exception relied upon is that in paragraph (b) of that definition, it must be shown that the association is constituted under a written law which specifically enables or provides for its constitution.

[100] Based on our analysis, we allow this appeal in part. The order of the Court of Appeal allowing para. (1) (as amended) and para. (2) of the application for judicial review is set aside. The order allowing paras. (3) and (5) of the application for judicial review is affirmed.

[101] In the circumstances of this case, we make no order as to costs.

[102] Finally, we wish to state that this judgment is delivered pursuant to s. 78 of the Courts of Judicature Act 1964 as our brother, Raus Shariff, has retired.